Supreme Court, U.S.
FILED
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No. 01-52

IN THE

Supreme Court of the United States

PACIFIC FISHERIES CORP.,

Petitioner,

v.

H.I.H. CASUALTY & GENERAL INSURANCE, LTD., H.I.H. MARINE INSURANCE SERVICES, INC., HIGHLANDS INSURANCE COMPANY, AGF-MAT, HARLOCK WILLIAMS LEMON, LTD., corporations,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Ninth Circuit rule enunciated in *Lewis v. Time, Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983) unduly restrict the discretion of District Courts to grant relief from a late jury demand in cases removed from State courts under Fed. R. Civ. P. 81(c)?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Pacific Fisheries Corp., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Pacific Fisheries Corp. v. H.I.H. Cas. & Gen. Ins., Ltd., No. C 97-4174 CRB, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 1998 AMC 1447 (N.D. Cal. 1998), 1999 U.S. Dist. LEXIS 4231, March 31, 1999, Decided, March 31, 1999, Filed, April 1, 1999, Entered in Civil Docket. (APP. B)

STATEMENT OF JURISDICTION

The District Court, Hon. Charles R. Breyer presiding, entered judgment in favor of Respondent insurers on March 31, 1999. (APP. B) The District Court denied Petitioner's motion for a new trial on May 14, 1999. (APP. C) The Opinion of the Ninth Circuit was filed February 9, 2001. (APP. A) The Ninth Circuit denied Petitioner's petition for rehearing on April 11, 2001. (APP. E) This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

RULES INVOLVED

The following provisions of the Federal Rules of Civil Procedure are involved in this matter:

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to the issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes

a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court,

with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 81. Applicability in General

. . . .

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in

> the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

STATEMENT OF THE CASE

This petition seeks to compel the Ninth Circuit to allow District Courts the discretion to grant relief from the waiver of a jury by a failure to state the demand within "10 days after the service of the last pleading directed to such issue." (Fed. R. Civ. P. 38(b)). A review of the case law will demonstrate that the District Courts in the Ninth Circuit are unique in their lack of such discretion. The limitation on Ninth Circuit District Court judges was described by the trial judge, Judge Breyer, as follows:

> One of the things that came as a surprise to me when I became a judge is a federal rule concerning jury waivers because it appears to me that the District Court has almost no discretion where there's been a failure to demand a jury trial. . . . This is not the first time I have had this issue, in fact, the fourth time I have had this issue, that my hands are tied.

(APP D)

In no other Circuit could a District Court judge make a statement that his "hands are tied" in denying such relief. By this *Writ of Certiorari*, this Court is requested to compare the rules and procedures of the Ninth Circuit with those of every other Circuit. Such a review will demonstrate that any discretion that may exist in this regard in the Ninth Circuit is illusory. The only "exceptions" that appear in the Ninth Circuit arise out of cases where a District Court within the Ninth Circuit might refuse to follow the "entrenched" rule and grant waivers under the standard followed by the majority of the Circuits (*see Johnson v. Dalton*, 57 F. Supp. 2d 958, 960-61 (C.D. Cal. 1999)); or elsewhere the Ninth Circuit itself goes through a tortuous exercise to find that the rule does not apply (*see Mondor v. United States District Court for Central District of California*, 910 F.2d 585, 587 (9th Cir. 1990), discussed *infra*).

REASONS FOR GRANTING THE WRIT

Fed. R. Civ. P. 81(c), governs when and whether a party must demand a trial by jury upon removal from a state court. In the event that a party to a removed action fails to file and serve its jury demand as required by Rule 81(c), in all circuits other than the Ninth an evaluation is conducted of the reasons for the failure, the prejudice to the other party, and the effect on the court's docket. In the Ninth Circuit, however, there is virtually no "evaluation."

The appeal and the instant Petition for *Writ of Certiorari* are premised on the following statement by Judge Breyer:

> So your record is nice and clear, had I thought I had the discretion, I would have permitted it to reinstate the demand. *So it goes up on that issue.*

(APP D)

The Ninth Circuit "rule" and the arguments of Petitioner to rescind its waiver of a jury were succinctly and accurately stated by the Ninth Circuit's opinion as follows:

> An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown. [Citation]
>
> [Petitioner] attempts to distinguish between inadvertence and what it characterizes as a good faith mistake of law. Apparently, counsel misinterpreted Federal Rule 81(c), Northern District of California's local rules and state civil procedure rules and erroneously calculated the period of time available to make the demand. Counsel's reasons for his errors are of no consequence because they are still due to inadvertence or oversight. Therefore, pursuant to the precedent of this circuit, the jury demand was untimely.
>
> In [Citation] the plaintiff also attempted to excuse a late demand for a jury trial because her attorney mistakenly believed that no demand was necessary under Federal Rule 81(c). We held, "these facts . . . show nothing more than inadvertence and neglect. The district court thus did not abuse its discretion in refusing to order a jury trial." Id. As in [Citation], the district court in the present case did not abuse its discretion in denying the demand because counsel inadvertently missed the deadline. A good faith mistake of law is no different than inadvertence or oversight. Therefore, an untimely jury demand

> due to legal mistake does not broaden the district court's narrow discretion to grant the demand.

Pacific Fisheries Corp. v. H.I.H. Cas. & Gen. Ins., Ltd., 239 F.3d 1000 at 1002-03 (footnotes omitted) (APP A)

This *Writ of Certiorari* would not be brought, and indeed the appeal itself would not have been filed, if the District Court had ruled that based on the merits it was exercising its discretion to *deny* Fisheries' belated request for a jury trial. However, based on the merits it is clear that Judge Breyer would have preferred to *allow* a jury determination, and it is clear that he could have done so in each of the other Circuits.

In the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and the Eleventh Circuits, there is no question that the District Court would have had the discretion Judge Breyer did not have. Typical cases from these Circuits are the following:[1] *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987) ("[T]he trial court's 'discretion under Rule 39(b) is very broad,' so much so that it 'would be very rare' to find an abuse of discretion in either denying or granting a Rule 39(b) motion.") (834 F.2d at 1109); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 198 (1st Cir. 1987); *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389 (2d Cir. 1983) ("[D]istrict judges have broader discretion to grant relief from jury trial waivers under Rule 81(c) because of the greater latitude that state court judges have in that regard which federal courts are free to exercise where a case

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1. The decisions cited are in part ones which uphold the refusal to grant a waiver for a late jury request; however, the discussion of the cases make it clear that there is a broad grant of discretion to the District Courts in those Circuits.

is removed to the federal courts.") (702 F.2d at 391 n.3); *In re EEOC v Britrail Travel International Corp.*, 129 F.R.D. 116 (D.N.J. 1989) (" 'Technical insistence upon imposing a penalty for default by denying a jury trial is not in the spirit of the rules.' ") (129 F.R.D. at 117 [*citing* C. Wright and A. Miller, 9 Federal Practice and Procedure § 2334 at 115 (1971)]); *Malbon v. Pennsylvania Millers Mutual Ins. Co.*, 636 F.2d 936 (4th Cir. 1980) ("The factors which courts have weighed when deciding whether to grant a jury trial under Rule 39(b) include (1) whether the issues are more appropriate for determination by a jury or a judge (*i.e.*, factual versus legal, legal versus equitable, simple versus complex) [Citation]]; (2) any prejudice that granting a jury trial would cause the opposing party [Citation]; (3) the timing of the motion (early or late in the proceedings) [Citation]; [and] (4) any effect a jury trial would have on the court's docket and the orderly administration of justice [Citation].") (636 F.2d at 940 n.11); *Vannoy v. Cooper*, 872 F. Supp. 1485 (E.D. Va. 1995) ("The two decisions on which the Ninth Circuit relied in *Lewis* [*v. Time, Inc.*] do not support the result reached there.") (872 F. Supp. at 1488); *Daniel Int'l Corp. v. Fischback & Moore, Inc.*, 916 F.2d 1061 (5th Cir. 1990) ("[Rule 39(b)] modifies the usual approach to review of abuse of discretion. 'When the discretion of the court is invoked under Rule 39(b), the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.' [Citation]") (916 F.2d at 1064); *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987) ("Generally, a district court does not abuse its discretion by denying a 39(b) motion if the only justification for delay is 'mere inadvertence.' [Citation]. Additionally, the Ninth and Second Circuits have held that a 39(b) motion must be denied if the only reason for the delay was mistake or inadvertence. [Citations] In none of these cases, however, nor in any case cited by the

appellants, did the appellate court reverse a district court's decision to grant a jury trial. All of these cases involved affirmances of denials of such motions. Therefore, given the lack of precedent for reversing the grant of a jury trial, and the Seventh Amendment right to a jury trial, we are extremely reluctant to reverse the trial court's decision to grant a jury trial, even though its actions were somewhat unorthodox") (825 F.2d at 1013); *Orlowski v. TRW Inc.*, 765 F. Supp. 1277 (E.D. Mich. 1991) ("Defendant cites *Lewis v. Time Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983) for the proposition that a district court's discretion under Rule 39(b) 'is narrow . . . and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence.' Under *Lewis*, the Court might grant defendant's motion to strike. But *cf. Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389 (2d Cir. 1983) (despite view that trial court's discretion under Rule 39(b) is narrow, court affirmed trial court's grant of jury trial in removal case because state rules regarding the timing of jury demands differed from federal rules). Yet, the Sixth Circuit does not follow the Ninth Circuit's rigid approach.") (765 F. Supp. at 1278); *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir. 1983) ("[Rule 39(b)] grants wide discretion to the federal courts in considering untimely jury demands. That discretion must be exercised in the context of the interest asserted. A jury trial is not a minor feature of our judicial system. The right of a litigant to have his fellow citizens hear and weigh the evidence is a hallmark of our jurisprudential system. [Citations] See generally *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339-344, 58 L. Ed. 2d 552, 99 S. Ct. 645 (Rehnquist, J., dissenting) (history of constitutional right to jury trial)") (697 F.2d at 766-67); *AM International, Inc. v. Eastman Kodak*, 648 F. Supp. 506 (N.D. Ill. 1986) ("Perhaps because of the importance of the right to a jury trial and the

drastic result of failure to make a timely jury demand, Rule 39(b) permits a district court, in its discretion, to order a trial by jury on any or all issues upon motion of a party.") (648 F. Supp. at 507); *Littlefield v. Messenger*, 614 F.2d 581 (8th Cir. 1980) ("While we agree that courts 'ought to approach each application under Rule 39(b) with an open mind' [Citation] and that jury trials ought to be liberally granted when no prejudice results, we do not find the denial here to be an abuse of the district court's discretion. Littlefield offers no justification for the failure to make an appropriate demand other than inexperience, and he points to no prejudice resulting from denial. Furthermore, the record shows that Littlefield engaged in a pattern of conduct apparently intended to delay trial. Granting his request for a trial by jury at the pretrial conference stage would have further delayed final disposition of the matter. In these circumstances, denial of the request was within the bounds of the discretion of the trial court.") (614 F.2d at 585); *AMF Tuboscope v. Cunningham*, 352 F.2d 150 (10th Cir. 1965) ("[The] constitutional right to a jury trial under the Seventh Amendment is a fundamental right and 'the federal policy favoring jury trials is of historic and continuing strength.' The court in exercising its discretion under Rule 39(b) of the Federal Rules of Civil Procedure 'should grant a jury trial in the absence of strong and compelling reasons to the contrary.' ") (352 F.2d at 155) (footnotes omitted); and finally *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983) ("In this circuit, the general rule governing belated jury requests under Rule 39(b) is that the trial court 'should grant a jury trial in the absence of strong and compelling reasons to the contrary.' ") (707 F.2d at 1267).

Clearly the Ninth Circuit is out of step with the other Circuits in this regard, and the other Circuits have rejected

the Ninth Circuit's approach. What makes the Ninth Circuit rule even *more* arbitrary and unreasonable is that when it is desired to allow a waiver the rule is sometimes "distinguished" in a questionable manner. For instance, in *Mondor v. United States District Court for Central District of California*, 910 F.2d 585, 587 (9th Cir. 1990), the plaintiff had included a demand for jury in the caption of her state court complaint but made no further demand once the case was removed to federal court until the pretrial conference, held months after all the responsive pleadings had been filed. Although the District Court held that she had waived her right to a jury, the Ninth Circuit disagreed, rejecting defendant's argument that plaintiff had failed to timely serve her demand and explained:

> [In] any event, we would not read the procedural service requirement [of Rule 38(b)] in a manner that would deny the substantive rights of the petitioner when the demand was served on counsel before removal, and defendant was the party to bring the complaint and its jury demand to federal court. [Citation] (it was not the purpose of Rule 38 to make procedure the master of substantive rights).

910 F.2d at 586 n.1.

Any fair reading of the *Mondor* decision would require a conclusion that the Ninth Circuit avoided review of the rule of *Lewis v. Time, Inc.* in that one case while keeping the "rule" in place. This Writ seeks to eliminate this conflict between the Ninth Circuit and other Circuits, and within the Ninth Circuit itself, and join the Ninth Circuit with the majority view by overruling *Lewis v. Time, Inc.* to the extent

that it suggests an absolute bar to a District Court's discretion to grant relief for a late jury demand on cases removed from state court.

CONCLUSION

For the foregoing reasons, Fisheries respectfully submits that a Writ of Certiorari be issued to review the unduly restrictive approach of the Ninth Circuit in regard to jury waivers under Fed. R. Civ. P. 81(c).

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED FEBRUARY 9, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-16209

D.C. No.
CV-97-04174-CRB

PACIFIC FISHERIES CORPORATION, a California corporation,

Plaintiff-Appellant,

v.

HIH CASUALTY & GENERAL INSURANCE, LTD.; HIH MARINE INSURANCE SERVICES, INC.; HARLOCK WILLIAMS LEMON, LTD., A CORPORATION,

Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
November 15, 2000—San Francisco, California

Filed February 9, 2001

Appendix A

Before: J. Clifford Wallace, Raymond C. Fisher, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Rawlinson

* * *

OPINION

RAWLINSON, Circuit Judge:

The Pacific Fisheries Corp. ("Fisheries") appeals the district court's judgment following bench trial and denial of Fisheries' motion for a new trial in its diversity action against HIH Casualty & General Insurance and HIH Marine Insurance Companies ("The Insurers"). Fisheries alleges that the court erred in denying its untimely demand for a jury trial. Fisheries also contends that because the breach of the trading warranty contained in the marine insurance policies did not itself cause the loss, its losses should have been covered.

Because the district court properly denied the untimely jury demand and correctly found that the insurance policies were voided by breach of the trading warranty, we affirm.

BACKGROUND

The Appellant, Fisheries, operates a fishing vessel called the Icy Point. The Icy Point embarked on a fishing excursion in the Pacific Ocean from San Francisco on February 17, 1997. On March 11, 1997, Fisheries purchased insurance

coverage from The Insurers under two policies: a Protection and Indemnity Policy ("P & I") and a Hull and Machinery Policy ("Hull"). Each of these policies contained an identical trading warranty which provided that Fisheries' insured vessel was confined to the Pacific Ocean and was not to travel beyond certain points of that ocean.[1]

On March 31, 1997, the Icy Point began traveling to Guam in the normal course of business. The travel to Guam constituted a breach of the trading warranty. While in Guam, an employee of the ship filed a lawsuit against Fisheries on the ground that the malfunction of the boat's freshwater system caused him to suffer dehydration. When Fisheries informed The Insurers of these events, The Insurers advised Fisheries that they needed to determine the reason for the ship's breach of the trading warranty before agreeing to defend against the employee's claim. Further, The Insurers told Fisheries that they would not extend the trading warranty in general, even if they ultimately extended the warranty for the limited purpose of defending against the employee's claim.

The vessel departed Guam on May 10, 1997 and proceeded north, remaining outside the trading warranty area. Approximately one week later, the Icy Point experienced an engine breakdown. When Fisheries informed The Insurers of the breakdown, The Insurers refused coverage on the ground that the vessel once again was in breach of the trading warranty.

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1. The vessel was "confined to the waters and tributaries of the Pacific Ocean not west of 165 degree E. longitude, not south of 30 degrees S. latitude, and not north of 55 degrees N. latitude." This area does not include Guam.

Appendix A

Fisheries filed suit for breach of insurance contract in California Superior Court on October 22, 1997. The Insurers removed the action to the district court for the Northern District of California, based on diversity, on November 14, 1997. After Fisheries' Motion to Remand was denied, The Insurers answered Fisheries' complaint on July 31, 1998. Fisheries filed a demand for a jury trial on August 28, 1998. Pursuant to Federal Rule of Civil Procedure 38(b), Fisheries' demand was due on August 10, 1998.[2] The district court denied the demand as untimely.

Following a bench trial, the district court ruled in favor of The Insurers and entered judgment on April 1, 1999. The court found that the trading warranty provision was material to the insurance policy and that Fisheries had deliberately breached the warranty in complete disregard of the terms of the insurance contract.

Fisheries filed a motion for a new trial on April 12, 1999, which was denied on May 14, 1999. Fisheries filed its timely notice of appeal on June 11, 1999. We have jurisdiction pursuant to 28 U.S.C. § 1291.

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2. Rule 38(b) provides in relevant part, "Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand . . . not later than 10 days after the service of the last pleading directed to such issue. . . ." Because the answer filed by The Insurers on July 31, 1998 was the "last pleading directed to such issue," Fisheries' jury demand was due within 10 days of July 31, or August 10.

Appendix A

Jury Demand

We review the district court's denial of Fisheries' untimely demand for a jury trial for an abuse of discretion. *See Ticor Title Ins. Co. v. Florida*, 937 F.2d 447, 451-52 (9th Cir. 1991).

Fisheries contends that the district court erred in denying its demand for a jury trial pursuant to Federal Rule of Civil Procedure 39(b).[3] We have held,

> The district court, in its discretion, may order a jury trial on a motion by a party who has not filed a timely demand for one. F.R. Civ. P. 39(b). That discretion is narrow, however, and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence.

Lewis v. Time Inc., 710 F.2d 549, 556-57 (9th Cir. 1983); *see also Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987-88 (9th Cir. 1980).

An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown. *See Mardesich v. Marciel*, 538 F.2d 848, 849 (9th Cir. 1976); *see also Russ v. Standard Ins. Co.*, 120 F.3d 988, 989-90

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3. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Fed. R. Civ. P. 39(b).

(9th Cir. 1997) (holding that the district court could not employ another rule to circumvent this circuit's prohibition on granting untimely jury demands due to inadvertence); *Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 71 (9th Cir. 1996) (denying untimely jury demand when due to counsel's oversight and inadvertence); *Wall v. Nat'l R.R. Passenger Corp.*, 718 F.2d 906, 910 (9th Cir. 1983) (holding district court's denial of untimely jury demand not an abuse of discretion where counsel's inadvertence was the only reason shown).

Fisheries attempts to distinguish between inadvertence and what it characterizes as a good faith mistake of law. Apparently, counsel misinterpreted Federal Rule 81(c), Northern District of California's local rules and state civil procedure rules and erroneously calculated the period of time available to make the demand. Counsel's reasons for his errors are of no consequence because they are still due to inadvertence or oversight. Therefore, pursuant to the precedent of this circuit, the jury demand was untimely.

In *Beckham v. Safeco Ins. Co. of Am.*, 691 F.2d 898, 905 (9th Cir. 1982), the plaintiff also attempted to excuse a late demand for a jury trial because her attorney mistakenly believed that no demand was necessary under Federal Rule 81(c). We held, "these facts . . . show nothing more than inadvertence and neglect. The district court thus did not abuse its discretion in refusing to order a jury trial." *Id.* As in *Beckham*, the district court in the present case did not abuse its discretion in denying the demand because counsel inadvertently missed the deadline. A good faith mistake of law is no different than inadvertence or oversight. Therefore,

an untimely jury demand due to legal mistake does not broaden the district court's narrow discretion to grant the demand.[4]

Breach of Trading Warranty

The district court's interpretations of state law are reviewed *de novo*. *See Wetzel v. Lou Ehlers Cadillac Group*, 222 F.3d 643, 646 (9th Cir. 2000).[5]

Fisheries also argues that the district court erred in holding that the insurance policies were void due to Fisheries' breach of the trading warranty.[6] Fisheries contends that because the breach of the trading warranty itself did not cause the loss claimed, the policies are still effective. However, under California law, "breach of even an immaterial warranty will void a policy 'where the policy expressly declares that it shall avoid it.' " *Certain Underwriters at Lloyd's v. Montford*, 52 F.3d 219, 223 (9th Cir. 1995) (citations

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4. Fisheries also attempted to distinguish this case on the basis that the district court judge stated he had no discretion to grant a jury trial. Rather, the judge recognized his limited discretion under the law of this circuit.

5. Because this was a diversity action, it was governed by the law of the forum state. *See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co. Ltd.*, 132 F.3d 526, 528 (9th Cir. 1997) (court sitting in diversity applies the law of the forum state).

6. During oral arguments, counsel for Fisheries informed us that it was waiving its waiver and estoppel argument. Accordingly, this issue is not addressed.

omitted). Causation between the breach of warranty and any loss claimed is not required. In the present case, Fisheries received notice that any breach of the trading warranty would render coverage under the policy void. Accordingly, the district court did not err in finding the policies void.

Motion for New Trial

We review the district court's denial of Fisheries' motion for a new trial for an abuse of discretion. *See DeSaracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

The district court did not abuse its discretion in denying Fisheries' motion for a new trial. The court ruled that Fisheries had presented no case law to support its contention that The Insurers were required to show that the breach of the trading warranty caused the alleged loss and, in any event, the terms of the warranty were material to The Insurers' agreement to provide insurance. Also, the court reiterated that Fisheries had disregarded the insurance contract and deliberately breached the trading warranty.

Appendix A

CONCLUSION

The district court did not abuse its discretion by concluding that Fisheries had waived its right to a jury trial by failing to file a timely jury demand. The court's discretion was narrow because Fisheries' untimely demand was due to a mistake of law, which is no different than inadvertence or oversight. Additionally, the court did not err in concluding that the policies were void due to Fisheries' breach of the trading warranty, regardless of the relationship between the breach and the loss. Under California marine insurance law, causation is not required and The Insurers are not liable for the loss. No abuse of discretion occurred in the denial of Fisheries' motion for a new trial.

AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED AND FILED MARCH 31, 1999, ENTERED APRIL 1, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-4174 CRB

PACIFIC FISHERIES CORP., a California corporation,

Plaintiff,

v.

H.I.H. CASUALTY & GENERAL INSURANCE, LTD., H.I.H. Marine Insurance Services, Inc. Highlands Insurance Company AGF-MAT, Harlock Williams Lemon Ltd., corporations, and Does 1 through 15,

Defendants.

MEMORANDUM AND ORDER

Now before the Court is the question whether defendant H.I.H. Casualty & General Insurance, LTD ("H.I.H.") is legally obligated to cover losses suffered by the plaintiff's vessel, the F/V Icy Point, during a fishing excursion in 1997. In particular, plaintiff argues that H.I.H. is required to cover losses incurred as a result of: 1) a crewmember's lawsuit against Pacific Fisheries in Guam, and 2) an engine

breakdown off the coast of Japan. After having the benefit of a four-day bench trial beginning March 15, 1999, the Court finds in favor of the defendant for the reasons set forth below.

FINDINGS OF FACT

The Icy Point left San Francisco on February 17, 1997 to embark upon a fishing excursion in the Pacific Ocean. Prior to this date, Mr. Jason Kang, general manager for the plaintiff, had represented to plaintiff's insurance broker that the Icy Point would not depart until February 28, 1997. In response to this representation, plaintiff's broker wrote to Kang, "please keep in mind that coverage for crew has been deleted until February 28th. If you plan to have crew on board prior to that time, please call us as soon as possible." Rather than informing the broker that the vessel would be departing on February 17, Mr. Kang represented to the broker that the vessel's departure would be delayed further. Ultimately, he represented to the broker that the vessel would depart on March 11, 1999, and only began paying for full coverage on that date. When Mr. Kang made these representations regarding the departure date of the Icy Point, the vessel had already left port.

On March 11, plaintiff purchased coverage from defendant under two insurance policies: a Protection and Indemnity Policy ("P & I") and a Hull and Machinery Policy ("Hull"). Each of these policies contained an identical trading warranty which provided as follows:

> WARRANTED VESSEL ENGAGED IN THE COMMERCIAL FISHING INDUSTRY AND

Appendix B

CONFINED TO THE WATERS AND TRIBUTARIES OF THE PACIFIC OCEAN NOT WEST OF 165 DEGREES E. LONGITUDE, NOT SOUTH OF 30 DEGREES S. LATITUDE AND NOT NORTH OF 55 DEGREES N. LATITUDE

On March 7, four days before coverage attached, the broker faxed Mr. Kang information about the new coverage which included the following statement:

> The revised Trading Warranty, which should be placed on the vessel, will be as follows: WARRANTED engaged in the Commercial Fishing Industry and confined to the waters and tributaries of the Pacific Ocean not west of 165 degrees E. Longitude, not South of 30 degrees S. Latitude and not North of 55 degrees N. Latitude.

Further, on March 10, 1999, the broker sent another telefax to Mr. Kang which included the following statement:

> I understand that the vessel may depart today and underwriters could decline coverage if the vessel goes beyond the current trading warranty on the policy. Please give me a call with any questions you may have.

Mr. Kang did not place the trading warranty on the vessel, which had left port almost two weeks earlier. Further,

Mr. Kang did not inform the ship's captain, John Johnson, of the warranty, and Captain Johnson was unaware of it during the time period relevant to this dispute.

Between March 21 and March 31, Captain Johnson communicated with Mr. Kang on numerous occasions. During these communications, he indicated a possible intention to travel to areas far west of 165 degrees East Longitude. On March 26, Captain Johnson sent a message to Mr. Kang which indicated that the vessel had already moved west of 165 degrees East Longitude. At no time during this period did Mr. Kang inform Captain Johnson of the requirement that the vessel remain east of 165 degrees East Longitude.

On March 31, Captain Johnson informed Mr. Kang that he intended to travel to Guam. Again, Mr. Kang failed to alert Captain Johnson to the warranty at this time.

The Court finds by a preponderance of the evidence that the Icy Point did not proceed outside the trade warranty area because of exigent circumstances.[1] Rather, Captain Johnson decided to proceed to Guam in the normal course of business, without regard to the warranty.

---

1. To the extent that Captain Johnson has testified to the contrary, the Court finds that this testimony is overshadowed by the written communications that took place between Johnson and Kang, as well as the fact that Johnson was unaware of the trading warranty to begin with. Further, the evidence at trial established that if the vessel was truly experiencing an emergency, it could have proceeded to various locations inside the warranty area; there was no particularized need to proceed to Guam.

Appendix B

When the vessel arrived in Guam, deckhand Charles Daniels filed a lawsuit against Pacific Fisheries and arrested the vessel, on the grounds that the malfunction of the boat's fresh water system caused him to suffer from dehydration. When Pacific Fisheries communicated to H.I.H. regarding these events, the company informed the plaintiff that it needed to determine the reason for the ship's breach of the trading warranty before agreeing to defend Mr. Daniel's claim under the P & I policy. Further, H.I.H. communicated to Pacific Fisheries that it would not extend the trading warranty in general, even if it did ultimately decide to extend it for the limited purpose of defending against Mr. Daniel's claim.[2]

Even during the period that the vessel remained in Guam, Mr. Kang never informed Captain Johnson of the trading warranty. The vessel departed Guam on May 10, 1997, and proceeded north, thereby remaining outside the warranty area. Approximately one week later, the Icy Point suffered a main engine breakdown approximately 600 kilometers off the coast of Japan. When Pacific Fisheries informed H.I.H. of this event, the company refused coverage on the grounds that the vessel once again was in breach of the trading warranty.

The Court finds by a preponderance of the evidence that the vessel departed Guam and proceeded to the north (thereby remaining west of 165 degrees East Longitude) in the normal course of business. As such, the Court rejects plaintiff's

2. Again, to the extent that there is conflicting testimony on this question, the Court finds in favor of the defendant. In particular, the Court finds credible the testimony of H.I.H. President Berndt Oberg.

contention that the vessel was prevented from proceeding back to the warranty area because of exigent weather conditions.[3] Rather, the Court finds that Pacific Fisheries simply disregarded the limitations of the trading warranty.

CONCLUSIONS OF LAW

Under California law, to establish that the plaintiff's alleged breach of the trading warranty eliminates defendant's duty to cover the losses described above, H.I.H. must demonstrate either that: 1) the policy declares that a violation of the trading warranty shall void it, or 2) the warranty is a material provision in the policy. *See, e.g., U.S. Fire Ins. Co. v. Liberati,* 1989 AMC 1436, 1441 (N.D. CA 1989). Although H.I.H. can point to no provision in the policy itself which establishes the materiality of the trading warranty, it has made a sufficient evidentiary showing that the warranty was material to the insured risks. First, plaintiff's broker informed Mr. Kang that a breach of the trade warranty could result in a rescission of the insurance contract. Second, H.I.H. informed Pacific Fisheries repeatedly that it did not want the vessel traveling near Guam and other islands in the area because of the legal problems that could arise in the region.[4] Third, when the Icy Point had been arrested in Guam, H.I.H. reiterated its position that it would not agree to extend the

3. The Court again finds that Captain Johnson's testimony in this regard is overshadowed by his written communications during the period in question, and by the fact that Captain Johnson did not even mention exigent weather conditions in his declaration, dated as recently as March 8, 1999.

4. Indeed, it appears that H.I.H. was prescient in this regard.

Trading Warranty for future coverage, even if it did agree to do so for the limited purpose of covering the costs associated with the vessel's arrest. In light of these factors, it is clear that H.I.H. considered the trading warranty provision to be material to the risk that it agreed to insure.[5]

Plaintiff's characterization of the breach as "minor" or unrelated to the loss that it eventually suffered is unavailing. Notwithstanding plaintiff's representations to the contrary, this is not a case in which a conscientious insured left the warranty area for a brief period of time out of inadvertence or exigent circumstances. Rather, the evidence establishes that Pacific Fisheries, and Mr. Kang in particular, demonstrated a complete disregard for the terms of the insurance contract. The existence of a trading warranty played no role in any of plaintiff's decisions regarding the activities of the Icy Point. Thus, to the extent that an insured might be excused from breaching a trading warranty because of inadvertence or exigent circumstances, *see, e.g., Lexington Ins. Co. v. Cooke's Seafood,* 835 F.2d 1364, 1367 (1988), such a principle does not apply to this case.

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5. Although the parties have expressed differing views as to whether state or federal law should apply to this case, the outcome is the same under federal law. *See, e.g., Lexington Ins. Co. v. Cooke's Seafood,* 835 F.2d 1364, 1366 (11th Cir.1988) ("admiralty law requires strict construction of express warranties in marine insurance contracts; breach of the express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss."); *Port Lynch Inc. v. New England International Surety of America, Inc.,* 754 F.Supp 816, 823-24 (W.D. Wash 1991).

Appendix B

CONCLUSION

For the reasons expressed herein, H.I.H. has no obligation to cover plaintiff's losses resulting from the arrest of the Icy Point in Guam in April 1997 and from the engine breakdown in May 1997. Judgment shall therefore be entered in favor of the defendant.

IT IS SO ORDERED.

s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

Dated: 3-31-99

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED AND FILED MAY 14, 1999

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-4174 CRB

PACIFIC FISHERIES CORP., a California corporation,

Plaintiff,

v.

H.I.H. CASUALTY & GENERAL INSURANCE, LTD., H.I.H. MARINE INSURANCE SERVICES, INC., HIGHLANDS INSURANCE COMPANY, AGF-M.A.T., HARLOCK WILLIAMS LEMON LTD., corporations and, DOES I through 15,

Defendants.

ORDER

Plaintiff's motion for new trial in the above-captioned matter is denied, for the following reasons:

1. The Court's April 1, 1999 Memorandum and Order (hereinafter "Order") finding in favor of defendant applied California law. *See* Order, at 4:12-16.

2. Plaintiff has presented no case law to support its contention that in the admiralty context, an insurance company must show that the material breach "caused" the loss which the insurance company refuses to cover. Furthermore, as indicated in the Order, there is a clear relationship between the breach and the loss in this instance. *See id.*, at 4:20-22.

3. The Order's factual finding that Mr. Kang failed to inform Captain Johnson of the existence of a trade warranty was not erroneous. Furthermore, this fact is highly probative of Mr. Kang's general disregard for the terms of the insurance contract.

4. The Order did not address the question whether defendant waived its right to complain of Mr. Kang's misrepresentations regarding the departure date of the Icy Point because it was unnecessary to address this question in order to resolve the dispute. Rather, the Court found in favor of the defendant because plaintiff breached the trade warranty. *See id.*, at 4-5. However, a recitation of the circumstances surrounding the departure of the Icy Point was relevant to the breach because it was highly probative of Mr. Kang's general disregard for the terms of the insurance contract.

IT IS SO ORDERED.

Dated: 5-14-99

s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

APPENDIX D — EXCERPT FROM TRANSCRIPT OF PROCEEDINGS DATED NOVEMBER 20, 1999

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
CHARLES R. BREYER, JUDGE

C 97-4174 CRB

SAN FRANCISCO, CALIFORNIA
FRIDAY, NOVEMBER 20, 1999

PACIFIC FISHERIES CORP.,
A CALIFORNIA CORPORATION,

PLAINTIFF,

V.

HIH CASUALTY & GENERAL INSURANCE, LTD., HIH MARINE INSURANCE SERVICES, INC., HIGHLANDS INSURANCE COMPANY AGF - M.A.T., HARLOCK WILLIAMS LEMON LTD., CORPORATIONS, AND DOES 1 THROUGH 15,

DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * *

Appendix D

[2] *FRIDAY, NOVEMBER 20, 1998* *10:00 A.M.*

THE CLERK: CALLING CIVIL 97-4174, PACIFIC FISHERIES VERSUS HIH CASUALTY.

MR. WINDES: GOOD MORNING, YOUR HONOR.

ROBERT WINDES, REPRESENTING THE DEFENDANT.

MR. HENSON: GOOD MORNING, YOUR HONOR.

LARRY HENSON, ON BEHALF OF THE PLAINTIFF.

THE COURT: ONE OF THE THINGS THAT CAME AS A SURPRISE TO ME WHEN I BECAME A JUDGE IS A FEDERAL RULE CONCERNING JURY WAIVERS BECAUSE IT APPEARS TO ME THAT THE DISTRICT COURT HAS ALMOST NO DISCRETION WHEN THERE'S BEEN A FAILURE TO DEMAND A JURY TRIAL, UNLIKE THE STATE COURT PROCEEDING. IT IS FAR MORE DISCRETIONARY. I DON'T THINK UNDER THE CASE OF *ROSS VERSUS STANDARD INSURANCE,* WHICH IS A NINTH CIRCUIT CASE, *LEWIS V TIME, CRAIG V ATLANTIC-RICHFIELD* — AND THESE ARE ALL CASES THAT I LOOKED AT. THIS IS NOT THE FIRST TIME I HAVE HAD THIS ISSUE, IN FACT, THE FOURTH TIME I HAVE HAD THIS ISSUE, THAT MY HANDS ARE TIED.

THE LAWYER COMES IN AND SAYS, "WELL, YOU KNOW, I DIDN'T REALIZE THAT THE TIME PERIOD

HAD PASSED," AND IT WAS ONLY A DAY LATE OR TWO DAYS LATE, OR IN THIS CASE, IT'S WHAT, TEN DAYS OR EIGHT, SOMETHING LIKE THAT. AND, YOU KNOW, YOU SAY, "OH, WELL, TEN DAYS LATER, FIVE DAYS LATER, TWO DAYS LATER, THAT'S NOT SERIOUS, SO I'LL REINSTATE IT."

BUT I HAVE TO TELL YOU THAT'S NOT THE LAW. AT LEAST, [3] THAT'S NOT MY UNDERSTANDING OF THE LAW, AND I'M BOUND TO FOLLOW THE LAW OF THIS CIRCUIT.

SO I WAS GOING TO STRIKE THE JURY DEMAND. IF YOU WANT TO SAY SOMETHING ON THE SUBJECT, I'LL BE GLAD TO HEAR IT; BUT I HAVE TO TELL YOU WHAT MY THINKING IS.

MR. HENSON: I KNOW THE BURDEN WOULD BE ON ME, THEN, YOUR HONOR. PERHAPS, I COULD JUST SAY A FEW WORDS.

IN 1976, IN THE *MARDEISCH* (PHONETIC) CASE, THE NINTH CIRCUIT CITED THE STRONG SECOND CIRCUIT RULE. THEN IN *TIME VERSUS LEWIS*, THE CASE THAT'S ALWAYS CITED, IN 1983, THE NINTH CIRCUIT SET ITS OWN STRONG RULE, BUT THE NINTH CIRCUIT HAS NEVER OVERRULED *PETERSON VERSUS SOUTHERN PACIFIC COMPANY.*

THE CASES THAT WE'VE CITED, THEY'RE ALL CASES WHERE THE TRIAL COURT STRUCK A JURY AND THEN THEY ALL CITE TIME, AND THEN THEY

SAY *TIME* SAYS THIS, "AND SO THE COURT DIDN'T ABUSE ITS DISCRETION."

BUT WE SEE IN CASES SUCH AS *MONDOR* WHERE THERE'S EXCEPTIONS TO THE RULE, AND THE FACT IS, YOUR HONOR, UNTIL THE NINTH CIRCUIT OVERRULES *PETERSON*, THE COURT HAS DISCRETION. THE NINTH CIRCUIT HAS TOLD THE COURT, "WE WANT YOU TO EXERCISE THIS DISCRETION VERY NARROWLY." AND I'M — YOU KNOW, HERE WE DO HAVE THE SUBSTITUTION OF COUNSEL. WE DO HAVE A LOCAL RULE, WHICH I BELIEVE IS DEFICIENT. THEY SHOULD GO TO THE CENTRAL DISTRICT RULE, WHICH IS CLEAR, INSTEAD OF BEING A TRAP FOR THE UNWEARY.

[4] UNDER *PETERSON*, THE COURT HAS DISCRETION. UNDER *TIME*, THE NINTH CIRCUIT WANTS THE COURT TO EXERCISE DISCRETION VERY NARROWLY. WE BELIEVE THIS IS A CASE WHERE THE COURT SHOULD EXERCISE DISCRETION, YOUR HONOR.

MR. WINDES: YOUR HONOR, I SEE NO POINT IN BELABORING IT. I DO BELIEVE THAT THE CONTROLLING NINTH CIRCUIT CASE LAW ALLOWS THE COURT NO DISCRETION TO RELIEF HIM OF HIS UNTIMELY JURY DEMAND.

THE COURT: SO YOUR RECORD IS NICE AND CLEAR, HAD I THOUGHT I HAD THE DISCRETION, I WOULD HAVE PERMITTED IT TO REINSTATE THE DEMAND. SO IT GOES UP ON THAT ISSUE.

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MR. HENSON: WOULD WE HAVE LEAVE FOR AN INTERLOCUTORY GOING UP TO TEST IT, YOUR HONOR?

THE COURT: NO. AND I APPRECIATE THE REQUEST, AND I UNDERSTAND THAT THE NINTH CIRCUIT WILL NOT BE VERY HAPPY TO SEE THIS CASE IN THAT POSTURE, OR ANY CASE, YOU KNOW, LITIGATED IN THAT POSTURE.

SO, YOU KNOW, YOU GOT ME, AND YOU GOT YOUR RECORD, AND YOUR MOTION — I GUESS IT'S YOUR MOTION TO STRIKE THE JURY DEMAND — IS GRANTED FOR THE REASONS STATED IN THE UNDERLYING OPINION.

* * *

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 11, 2001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-16209

DC# CV-97-04174-CRB
Northern District of California

PACIFIC FISHERIES CORPORATION,
a California corporation,

Plaintiff-Appellant,

v.

HIH CASUALTY & GENERAL INSURANCE, LTD.; HIH MARINE INSURANCE SERVICES, INC.; HARLOCK WILLIAMS LEMON, LTD, a corporation,

Defendants-Appellees.

ORDER

Before: WALLACE, FISHER, and RAWLINSON, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing en banc.

Appendix E

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is DENIED.

Supreme Court, U.S.
FILED
AUG 9 2001
CLERK

(2)

No. 01-52

In The

Supreme Court of the United States

PACIFIC FISHERIES CORP.,

Petitioner,

v.

H.I.H. CASUALTY & GENERAL INSURANCE, LTD., H.I.H. MARINE INSURANCE SERVICES, INC., HIGHLANDS INSURANCE COMPANY, AGF-MAT, HARLOCK WILLIAMS LEMON, LTD., corporations,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether this court should use its supervisory power to direct the United States District Court to vacate its order striking petitioner's jury demand and set the matter for a jury trial in the petitioner's action against H.I.H. in light of the Ninth Circuit courts' approach to jury waivers under Fed.R.Civ.P. 81(c), the Ninth Circuit Court's approach to the issue is consistent with the Supreme Court's precedents and is not in conflict with the other circuits.

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STATEMENT OF THE CASE

Petitioner made an untimely request for a jury trial under the Federal Rule of Civil Procedure 81(c). Petitioner admitted that the only reason for untimely request was inadvertence of counsel based on his misreading of the rule. The District court ruled that inadvertence of counsel could not support an untimely request under Rule 81(c). This conclusion was affirmed by the Ninth Circuit Court of Appeals.

The parties then tried the case on the merits to the trial court without a jury, and judgment was entered against the Petitioner on all of its claims. The Petitioner appealed to the Ninth Circuit Court of Appeals, and the appeal was denied.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S APPEAL AFTER A TRIAL ON THE MERITS SHOULD BE DISFAVORED

The petitioner claims that the district court improperly denied its jury demand. Rather than file a writ of mandamus, however, the Petitioner went through a full trial on the merits and appealed only when it lost at trial.

This court has long established that a writ of mandamus is a proper way to compel the lower court to conduct a jury trial: "Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). The Ninth Circuit approach

follows the long-standing opinions of the Supreme Court. It is well settled in the Ninth Circuit that a writ of mandamus is a proper remedy where petitioner seeks to compel the lower court to grant a jury trial. *Mondor v. United States District Court*, 910 F.2d 585 (9th Cir. 1990), *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir. 1983); *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

This court should look with disfavor on appeals made after a trial on the merits where the right to appeal by writ of mandamus before trial is well established.

II. REVIEW BY THE SUPREME COURT IS NOT APPROPRIATE BECAUSE THE NINTH CIRCUIT'S APPROACH IS NOT IN CONFLICT WITH THE OTHER CIRCUITS.

The Ninth Circuit is not "out of step" with the other circuits in its treatment of the late demands for a jury trial. The Ninth Circuit follows the Federal Rule of Civil Procedure 81(c) in determining whether a party properly demanded a trial by jury upon removal from a state court. There is no case in any of the circuits that has held that a trial court should grant an untimely jury demand based upon inadvertence of counsel.

A. The Ninth Circuit Rule.

The Ninth Circuit rule followed by the district court in this case is set forth in *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983):

> The district court, in its discretion, may order a jury trial on a motion by a party who has not filed a timely demand for one. F.R.Civ.P 39(b). That discretion is narrow, however, and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence. *Chandler Supply Co. v. GAF Corp.*, 9 Cir., 1980, 650 F.2d 983, 987; *Mardesich v. Marciel*, 9 Cir., 1976, 538 F.2d 848, 849.

See also *Kletzelman v. Capistrano*, 91 F.3d 68 (9th Cir. 1996).[1]

The Ninth Circuit's approach reflects the Supreme Court's notion that the interpretation of a rule should not be expanded when the language of the rule plainly expresses a limitation. *Schlagenhauf v. Holder*, 379 U.S. 104, 121, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). The Supreme Court stated that "Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of vague sympathy for participating litigants. . . . [S]trict adherence to the procedural requirements . . . is the best guarantee of evenhanded administration of the law." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984).

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[1] Petitioner claims a conflict in the Ninth Circuit based on *Mondor v. United States District Court for Central District of California*, 910 F.2d 585 (9th Cir. 1990). The court simply found the rule did not apply because the plaintiff had made a jury demand in the state court complaint, which was filed in the record of the federal court. Petitioner here made no such demand.

Federal Rule of Civil Procedure 81(c) provides that Rule 38(b) applies to jury demands in removed actions where responsive pleadings have not been filed prior to removal. Federal Rule of Civil Procedure 38(b) provides that a party seeking to have a disputed issue tried before a jury must serve "upon other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." Both rules plainly establish limitations and procedural requirements for a jury demand in removed actions. If the plain meaning of the Federal Rules of Civil Procedure is clear, that meaning is conclusive. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). Federal Rule of Civil Procedure 81(c) is clear and conclusive.

B. Ninth Circuit Rule Is Not In Conflict With The Other Circuits.

Petitioner misstates the holdings of a number of cases from other circuits for the proposition that the Ninth Circuit rule is contrary to the law in the other circuits. In those cases cited by Petitioner from the Second, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits, the courts actually stated their agreement with the Ninth Circuit rule at issue. In the cases cited by the Petitioner from the First, Sixth and Tenth Circuits, the courts did not indicate a disagreement with the Ninth Circuit rule, and decided the cases on facts other than inadvertence of counsel. None of the appellate cases cited by the petitioner suggested that, where mere inadvertence of counsel is the

basis for missing the deadline, the trial court should exercise discretion to grant a jury trial. There is no conflict amongst the circuits on this issue.

The Second Circuit rule on point was established in *Noonan v. Cunnard Steamship Co.*, 375 F.2d 69 (2nd Cir. 1967), holding that inadvertence of counsel was not a basis for allowing an untimely jury demand. In its most recent reference to that rule, in *Cascone v. Ortho Pharmaceutical Corporation*, 702 F.2d 388, 390 (2nd Cir. 1983), the court reiterated that holding as follows:

> The district judge recognized that in *Noonan v. Cunnard Steamship Co.*, 375 F.2d 69 (2nd Cir. 1967), this court held that mere inadvertence of counsel was not an adequate basis for allowing an untimely filing of a jury trial notice. . . . We do not consign *Noonan* to overruled status. Its holding shall continue to govern cases where it is applicable. *Id.* at 390-393.

In *Daniel Intern. Corp. v. Fischback and Moore, Inc.*, 916 F.2d 1061 (5th Cir. 1990), the defendant made no objection to jury demands made by plaintiff on three occasions, and brought a motion to strike fourteen months after the first jury demand, and only then after the trial was continued on two occasions. One of the jury demands was made by way of a motion which requested a jury demand, and the motion was granted in its entirety without opposition by the defendant. The court also found significant that the case was already on the jury calendar when the motion to strike was brought. Indeed, the Fifth Circuit confirmed the law of the Fifth Circuit as follows:

> This analysis should not be construed as departing from our rule that the movant's "mere inadvertence" in not making a timely demand under Rule 38 provides no justification for invoking Rule 39(b). *Bush v. Allstate Insurance Co.*, 425 F.2d 393, 396 (5th Cir.), *cert. denied*, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed.2d 64 (1970); *Fredieu v. Rowan Companies, Inc.*, 738 F.2d 651, 654 (5th Cir. 1984).

In *Merrit v. Faulkner*, 697 F.2d 761 (7th Cir. 1983), the court noted with approval the substantial case law holding that inadvertence of counsel is not enough to support a Rule 39(b) motion. *Id.* at 767. The court then distinguished those cases as follows:

> But this is not a case of mere inadvertence of counsel. This motion was made by a blind *pro se* litigant who indicated from his first pleadings, through his requests for counsel, that he did not feel competent to represent himself in court.

Id. at 767.

The case of *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980) supports the denial of a jury in this case. The court affirmed the district court's denial of a late jury demand where the pro se plaintiff offered no justification for his late request other than lack of experience.

In *Nissan Corp. in U.S.A. v. Burciaga*, 982 F.2d 408 (10th Cir. 1992), the court denied a writ of mandamus to compel the district court to grant its late request for a jury trial. In so deciding, the court explained that the plaintiff offered no excuse other than inadvertence or oversight, and its mistaken belief that the other party had requested a jury.

In *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983), the plaintiff failed to even state a reason for her failure to file a timely Rule 38(b) request for jury. Citing several cases holding that a failure due to mere inadvertence is not a basis for reversal of a trial court's denial of a Rule 39(b) motion, the denial of the jury request was affirmed.

The facts in *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987) and *Malbon v. Pennsylvania Millers Mutual Ins. Co.*, 636 F.2d 936 (4th Cir. 1980) were identical to one another. The defendants who removed the cases to federal court had the responsibility for making out the civil cover sheet and mistakenly designated the case as one to be tried to a jury. The courts observed that the plaintiff was lulled into a false sense of security by the defendant's error, excusing the late filing of a demand. Moreover, the court in both instances affirmed the district court's decision on the jury issue after the case was tried on that basis.

Unlike this case, the court in *Ketchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987) was asked to reverse the granting of a jury trial. The court noted in its analysis that:

> Generally, a district court does not abuse its discretion by denying a 39(b) motion if the only justification for delay is "mere inadvertence." *Misco*, 784 F.2d at 205.

Ketchen, 825 F.2d at 1013.

The court in *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150 (10th Cir. 1965), reversed the district court's denial of a jury trial. However, in that case, both parties had stipulated to and requested a jury trial, the judge had approved the stipulation, and the judge vacated its prior

order for jury trial on the eve of trial on the basis of his own motion. Inadvertence of counsel was not at issue.

Whether the Court looks to well-established case law within the Ninth Circuit or case law in other circuits, the result is the same. Inadvertence or oversight of counsel is simply not a sustainable basis for granting relief from an untimely jury demand in any of the eleven circuits.

CONCLUSION

Petitioner has failed to articulate an issue appropriate for this Court's review. There is no conflict among the federal circuits on the issue, the Ninth Circuit's rule is in accordance with the Supreme Court's precedents and the issue is not of a great importance that would have significant practical consequences, but rather is limited to the facts of this case. The Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 01-52

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IN THE

Supreme Court of the United States

PACIFIC FISHERIES CORP.,

Petitioner,

v.

H.I.H. CASUALTY & GENERAL INSURANCE, LTD., H.I.H. MARINE INSURANCE SERVICES, INC., HIGHLANDS INSURANCE COMPANY, AGF-MAT, HARLOCK WILLIAMS LEMON, LTD., corporations,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I. THE NINTH CIRCUIT IS IN CONFLICT WITH ALL OTHER CIRCUITS

The arguments and authorities contained in Respondent's Brief in Opposition would be appropriate if the district court had "exercised its discretion" and denied petitioner's late jury request on that basis. In fact, there would have been no appeal and no request to this Court in that event. This is because Rule 39(b), Federal Rules of Civil Procedure, appears to grant the district court absolute discretion to deny a jury trial after a late demand. The district courts' exercise of discretion to deny a jury after a late demand is almost invariably upheld in *all* of the circuits.

In only *one* of those circuits, however — the *Ninth* — could a district court judge state that he *would* have granted a jury trial *if* he had the discretion to do so. All we ask this Court to do is to instruct the Ninth Circuit that the language of Rule 39(b) granting discretion to the district court judge cannot be eliminated by judicial fiat.

II. MANDAMUS WAS NOT AN APPROPRIATE REMEDY

About whether mandamus would have been a more appropriate remedy, this is not a matter where the district court judge was at variance with judicial precepts in the Ninth Circuit. Rather, it was a matter where the district court judge ruled, correctly, that the Ninth Circuit gave him no choice but to deny the request for a jury. Even in a case such as *Armster v. United States Dist. Court for Cent. Dist.*, 792 F.2d 1423 (9th Cir. Cal. 1986) where there was a finding of an unconstitutional suspension of the civil trial system, the Ninth Circuit refused to grant mandamus, stating that

"[m]andamus is a drastic remedy that should be invoked only in extraordinary circumstances."[1] (792 F.2d at 1431). It is doubtful that the Ninth Circuit would consider a district court's following its explicit instructions to make up such an "extraordinary circumstance."

It should also be noted that petitioner requested leave for an interlocutory appeal of the issue to allow the Ninth Circuit to revisit the question before trial. In response to that request, the district court correctly noted as follows:

* * *

> NO. AND I APPRECIATE THE REQUEST, AND I UNDERSTAND THAT THE NINTH CIRCUIT WILL NOT BE VERY HAPPY TO SEE THIS CASE IN THAT POSTURE, OR ANY CASE . . . LITIGATED IN THAT POSTURE.
>
> SO . . . YOU GOT ME, AND YOU GOT YOUR RECORD. . . .

* * *

(Appendix D, p. 24a).

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1. Citing *Kerr v. United States District Court*, 426 U.S. 394, 402, 48 L. Ed. 2d 725, 96 S. Ct. 2119 (1978).

CONCLUSION

Thus, this writ is sought after exhausting the appropriate remedies below. The writ does not attack the exercise of discretion by the district court. Rather, the writ seeks to require the Ninth Circuit to grant to district court judges the discretion mandated by Rule 39(b). Here, the district court judge has unequivocally stated that he would exercise that discretion in favor of a jury.

Respectfully submitted,

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